IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MATTHEW ROMAN, M.D. Plaintiff, v. WILLIAM P. BARR,[1] Attorney General of the United States, THOMAS E. BRANDON, Director, Bureau of Alcohol, Tobacco, Firearms & Explosives, CHRISTOPHER WRAY, Director of the Federal Bureau of Investigation, and THE UNITED STATES OF AMERICA, Defendants.	)	Civil Action No. 2:18-cv-4947-JS

MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS

[1] By operation of Fed. R. Civ. P. 25(d), Attorney General Barr has automatically been substituted for former Acting Attorney General Matthew G. Whitaker as a Defendant in this action.

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INTRODUCTION

The Second Amendment guarantees "the individual right to possess and carry weapons" for "law-abiding, responsible citizens." *Dist. of Colum. v. Heller*, 554 U.S. 570, 592, 635 (2008); *see Binderup v. Att'y Gen.*, 836 F.3d 336, 343 (3d Cir. 2016) (en banc). Consistent with that understanding, the Supreme Court stated in *Heller* that "nothing in [its] opinion should be taken to cast doubt" on certain well-established firearms regulations, including "longstanding prohibitions on the possession of firearms" by certain categories of persons from possessing weapons, such as "felons and the mentally ill." 554 U.S. at 626 & n.26. Federal law contains a similar prohibition for unlawful users of controlled substances. *See* 18 U.S.C. §§ 922(d)(3), 922(g)(3). Plaintiff readily acknowledges that he falls within this category—that is, that he is an unlawful, regular "consumer" of marijuana (also known as cannabis), an illegal, mind-altering drug, which under federal law cannot be legally prescribed for medical use (and the possession of which is a criminal offense). Plaintiff argues that the resulting restriction on his right to possess firearms violates his Second Amendment and other constitutional rights. Because the Second Amendment does not protect those who choose to illegally take mind-altering drugs, and who commit to continuing to do so, Plaintiff's Second Amendment rights have not been violated. Therefore, consistent with *Heller*, *Binderup*, and the decisions of every Court of Appeals to consider the issue, this Court should reject Plaintiff's Second Amendment claims.[2]

[2] Each cause of action in the Complaint and each provision of requested relief include challenges to both 18 U.S.C. §§ 922(d)(3) and 922(g)(3). Section 922(d)(3) "prohibits the sale of a firearm to any person whom the seller knows or has reasonable cause to believe" is prohibited from possessing firearms by Section 922(g)(3). As courts have recognized, "the reasoning [applicable] [to a] Court's determination [regarding] § 922(g)(3) applies equally to [a] challenge to section (d)(3) of the same statute" because the purpose of Section 922(d)(3) is simply to "prevent such prohibited persons from acquiring firearms." *Wilson v. Holder*, 7 F. Supp. 3d 1104, 1117 (D. Nev. 2014); *aff'd sub nom. Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016); *accord Enos v. Holder*, 2011 WL 2681249 (E.D. Cal. July 8, 2011) (analyzing 18 U.S.C. §

Plaintiff's other claims equally lack merit. The Constitution makes federal law "the supreme law of the land," and courts have unanimously rejected claims that states can exempt their citizens from federal prohibitions on unlawful drug use. Unlawful drug users are not a protected class, and it is entirely rational for Congress to treat them differently from lawful users of alcohol, lawfully-prescribed drugs, or other forms of medical treatment, who may be permitted to acquire and use firearms. Legislative enactments such as Congress's prohibition on marijuana usage satisfy the Fifth Amendment's due process clause through the legislative process and need not provide individual hearings. Protections against self-incrimination are not implicated by the firearms application form submitted to ATF. And Plaintiff's statutory interpretation argument has been rejected by the United States Supreme Court.

In the context of these meritless claims, Plaintiff's lengthy narrative about marijuana, its cultivation and usage, and the rise of the statutory prohibition on marijuana use are nothing more than misdirection. This narrative does not affect the genuinely relevant facts at issue in this case: Plaintiff is knowingly and repeatedly choosing to violate the law by "continu[ing] to use . . . cannabis," Compl. at ¶ 29, a mind-altering controlled substance that Congress has acted within its constitutional authority to outlaw. The Constitution simply does not provide such persons the right to arm themselves with lethal weapons while they do so.

LEGAL BACKGROUND

I. Federal Regulation of Firearms

Congress passed the Gun Control Act ("GCA") to "regulate more effectively interstate commerce in firearms" to reduce crime and misuse, "assist the States and their political

922(d)(9) in conjunction with parallel restriction on possession). Treating these provisions in parallel is logical because the Government's interest in restricting the transfer of firearms to Plaintiff is concomitant with its interest in restricting his possession of firearms. For simplicity of analysis, Defendants will therefore analyze these provisions together throughout this brief.

subdivisions to enforce their firearms control laws," and "help combat . . . the incidence of serious crime." *See* 18 U.S.C. § 921 *et seq.*; S. Rep. No. 89-1866, at 1 (1966). The specific prohibitions in 18 U.S.C. § 922(g)—including bans on the possession of firearms by felons, the mentally ill, fugitives from justice, and unlawful drug users—were "meant to keep firearms out of the hands of presumptively risky people." *U.S. v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011); *see also Abramski v. U.S.*, 573 U.S. 169, 172 (The GCA "regulate[s] . . . principally to prevent guns from falling into the wrong hands . . . felons, drug addicts, and the mentally ill, to list a few"). The provision addressing unlawful drug users, § 922(g)(3) provides that:

> [i]t shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)) . . . to . . . possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(3). To reinforce § 922(g)(3), Congress also banned the sale of firearms to the same categories of presumptively risky people. As to unlawful drug users, § 922(d)(3) makes it "unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802))." *Id.* § 922(d)(3).

The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") is charged with administering the GCA, and has defined an "[u]nlawful user of or addicted to any controlled substance" as used in 922(d)(3) and (g)(3):

> A person who uses a controlled substance and has lost the power of self-control with reference to the use of the controlled substance; and any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in

> such conduct. A person may be an unlawful current user of a controlled substance even though the substance is not being used at the precise time the person seeks to acquire a firearm or receives or possesses a firearm.

27 C.F.R. § 478.11. Consistent with the statute, the regulation further provides that a "controlled substance" is "[a] drug or other substance, or immediate precursor, as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802." *Id*.

II. Controlled Substances Act

Section 102 of the Controlled Substances Act defines "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter [21 U.S.C. § 812]." 21 U.S.C. § 802(6). Since the enactment of the Controlled Substances Act, marijuana has been classified as a Schedule I drug. 21 U.S.C. § 812(c), Schedule I(c)(10). By classifying marijuana within Schedule I, Congress has concluded that marijuana "has a high potential for abuse," that it "has no currently accepted medical use in treatment in the United States," and that "[t]here is a lack of accepted safety for use of [marijuana] under medical supervision." *Id*. § 812(b)(1). For this reason, Schedule I drugs, including marijuana, cannot be legally prescribed for medical use. *See* 21 U.S.C. § 829; *U.S. v. Oakland Cannabis Buyers' Coop*., 532 U.S. 483, 491 (2001) ("Whereas some other drugs can be dispensed and prescribed for medical use . . . the same is not true for marijuana."). Moreover, the knowing or intentional possession of marijuana is prohibited by federal law in almost all circumstances: for a Schedule I drug, including marijuana, the only exception to this ban on possession is for a federally approved research project. *See* 21 U.S.C. §§ 844(a), 823(f); *see also Gonzales v. Raich*, 545 U.S. 1, 14 (2005) ("By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the . . . possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study."). Courts have sustained the Controlled Substances Act against

numerous challenges, both to its overall framework and to its application to medical marijuana. *See, e.g., U.S. v. Canori*, 737 F.3d 181, 184 (2d Cir. 2013) ("Marijuana remains illegal under federal law, even in those states in which medical marijuana has been legalized"); *Raich v. Gonzales*, 500 F.3d 850, 864 (9th Cir. 2007) ("[F]ederal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate . . . pain and suffering"); *U.S. v. White Plume*, 447 F.3d 1067, 1074-76 (8th Cir. 2006) (no substantive due process right to farm marijuana); *Kuromiya v. U.S.*, 37 F. Supp. 2d 717, 726 (E.D. Pa. 1999) ("Smoking marijuana does not qualify as a fundamental right.") (internal quotations omitted).

ARGUMENT

I. Plaintiff is an Unlawful User of Marijuana in Violation of Federal Law.

Plaintiff contends that he is not an "unlawful user of or addicted to any controlled substance" under 18 U.S.C. § 922(g)(3) because those who use controlled substances "in a manner prescribed by a physician" are not "unlawful users." Compl. ¶¶ 174-77 (citing, *inter alia*, 27 C.F.R. § 478.11); *see id.* at ¶ 118 (contending that "[u]nder the Medical Marijuana Act and Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act, . . . use or possession of medical marijuana. . . is lawful within . . . Pennsylvania").[3] Although situated at the end of

[3] The General Assembly enacted the Pennsylvania Medical Marijuana Act, 2016 Pa. Laws 84, 35 CONS. STAT §§ 10231.101–10231.2110, to establish a framework for the state-law legalization of medical marijuana for certain medical conditions, including the issuance of identification cards to certain patients who have a "certification to use medical marijuana . . . issued by a practitioner." *Id.* §§ 403, 501. The Act took effect on May 17, 2016, and expressly recognizes that marijuana remains a Schedule I controlled substance under federal law. *See* 35 CONS. STAT. 10231.2109 ("provisions of this act with respect to dispensaries shall not apply beginning 1,095 days from the effective date of an amendment . . . removing marijuana from Schedule I of the Controlled Substances Act."). Pennsylvania law, like federal law, classifies "marihuana" and other related products as Schedule I controlled substances. *See* 35 PA. CONS. STAT. § 708.104(1)(iv) (marijuana), (iii)(16) (tetrahydraconnabinols), (vii) (synthetic cannabinoids). And except for certain narrow exceptions, Pennsylvania criminalizes the possession of even "a small amount of marihuana for personal use." 35 PA. CONS. STAT. § 780.113(a)(31), (g).

his Complaint, Plaintiff's other claims are premised on his attempt to characterize his behavior as lawful, and so Defendants will address this erroneous contention first.

Federal law prohibits the use and possession of marijuana, medical or otherwise. *See* 21 U.S.C. § 812 (controlled substances), *id.* § 844(a) (penalties); *Oakland Cannabis*, 532 U.S. at 491-95 (rejecting medical necessity as a defense to prohibition on manufacture and distribution of marijuana).[4] "By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of an [FDA] preapproved research study." *Gonzales*, 545 U.S. at 14 (citations omitted); *see* 21 U.S.C. § 802(6) (defining controlled substance to include any drug or substance "included in schedule I . . . of part B of this subchapter."); *id*. § 812(c), Schedule I at (c)(10).

Pennsylvania's adoption of state laws allowing medical marijuana in certain limited circumstances cannot change the unlawful status of marijuana under federal law. Federal law is the "supreme Law of the Land," "anything in the … Laws of any State to the contrary notwithstanding." *See* U.S. Const. art. VI. As a result, "[a]lthough state law may permit marijuana use for medicinal purposes under defined circumstances, federal law treats any possession, distribution, or manufacture of marijuana as a federal offense." *U.S. v. Brown*, 801 F.3d 679, 693 (6th Cir. 2015), *amended and superseded on other grounds*, 828 F.3d 375 (6th Cir. 2016).

For this reason, courts have consistently rejected claims akin to Plaintiff's assertion that his conduct falls within the exception in 27 C.F.R. § 478.11 for use in a manner "as prescribed

[4] The Controlled Substances Act supplies the rational basis for this prohibition: "The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2).

by a licensed physician." Compl. at ¶ 177. For example, in *Wilson v. Lynch*, addressing itself to Nevada's medical marijuana law, the Ninth Circuit observed:

> Under 21 U.S.C. § 812, marijuana is a Schedule I controlled substance, meaning that—as far as Congress is concerned—marijuana "has no currently accepted medical use in treatment[, and] there is a lack of accepted safety for use of the . . . substance under medical supervision." 21 U.S.C. § 812(b)(1)(B) & (C). No physician may legally prescribe marijuana as a matter of federal law, and no user of medical marijuana is using it "as prescribed by a licensed physician" within the meaning of 27 C.F.R. § 478.11.

835 F.3d 1083, 1099 (9th Cir. 2016) (alterations in original). The Sixth Circuit has likewise specifically rejected the notion that a patient who "obtained a medical marijuana card from the state" is a "lawful user" of marijuana, and therefore held that such conduct remains "unlawful" under § 922(g)(3). *U.S. v. Bellamy*, 682 F. App'x 447, 450 (6th Cir. 2017). As with the laws discussed in *Wilson* and *Bellamy*, Pennsylvania's Medical Marijuana Act cannot override federal law on point. "Despite the Commonwealth of Pennsylvania's enactment of its medical marijuana law . . . marijuana remains illegal under federal law, 21 U.S.C. § 801, *et seq*. and '[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.'" *U.S. v. Dinh*, 194 F. Supp. 3d 353, 356-57 (W.D. Pa. 2016) (quoting *Raich*, 545 U.S. 29, and denying motion to vacate sentence because PA's "medical marijuana law provides no basis to set aside Defendant's federal conviction").

All of the cases in this District that have considered the interaction between federal law and Pennsylvania's Medical Marijuana Act have similarly noted that the Commonwealth's legislation offers no relief from marijuana's status as an unlawful controlled substance under federal law. In *U.S. v. Bey*, Judge Kearney clarified that an individual on supervised release from federal prison cannot avail himself of Pennsylvania's Medical Marijuana Act because, "the possession, use and distribution of marijuana—even medical marijuana prescribed by a medical

provider under Pennsylvania Law—is illegal under federal law. . . . [F]ederal law preempts Pennsylvania's limited permission to use and possess doctor-prescribed medical marijuana." 2018 WL 5303323, at *1 (E.D. Pa. Oct. 25, 2018). In another case, based on marijuana's status as an illegal drug under federal law, Judge Pratter found that federal question jurisdiction existed in a landlord and tenant dispute regarding whether, among other things, the tenant's medical marijuana dispensary violated the term of the lease prohibiting use of the property for an "unlawful" purpose. *Pharmacann Penn, LLC v. BV Development Superstition RR, LLC*, 318 F.Supp.3d 708, 712 (E.D. Pa. 2018). Even though Judge Pratter did not rule on the merits in that order, she issued a relevant "word of caution": "It is not this Court's role to second-guess the political wisdom of federal legislation on marijuana."[5] *Id*. at 714 at n.3.

In sum, an avowed "consumer" of marijuana under Pennsylvania's Medical Marijuana Act cannot be engaged in anything other than unlawful conduct under federal law, because marijuana is a Schedule I controlled substance and may not lawfully be prescribed.

II. Plaintiff's Asserted Plan to Continue to Illegally Use a Controlled Substance Places Him Outside the Second Amendment's Protections As Long As That Use Continues.

In *Heller*, the Supreme Court held the Second Amendment protects the pre-existing, individual right to possess and carry a firearm, and the right to use that weapon for traditionally lawful purposes, such as self-defense unconnected to service in a militia. 554 U.S. at 577, 592-93. The Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home"—a right that is at the "core" of

[5] The Supreme Court and the Courts of Appeals have rejected every direct constitutional challenge to the regulation of marijuana. Those cases thus render irrelevant Plaintiff's allegations that marijuana regulation was implemented in an "unscientific" manner. *See, e.g.*, Compl. ¶ 72; *compare generally Raich* 545 U.S. 1; *Oakland Cannabis Buyers' Coop*., 532 U.S. 483; *Kuromiya v. U.S.*, 37 F. Supp. 2d 717 (E.D. Pa. 1999) (rejecting constitutional challenges to prohibition of medical uses of marijuana).

the Second Amendment. *Id*. at 635. At the same time, *Heller* specified a non-exhaustive list of "presumptively lawful regulatory measures" that have co-existed with the right. *See* 554 U.S. at 626–27 & n.26. The Court described those "permissible" measures as falling within "exceptions" to the protected right to keep and bear arms. *Id.* at 635; *see U.S. v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) (treating the "presumptively lawful regulatory measures" listed in *Heller* as "exceptions to the right to bear arms"). They include, but are not limited to, "longstanding prohibitions on the possession of firearms by felons and the mentally ill," *Heller*, 554 U.S. at 626–27, measures which "comport with the Second Amendment because they affect individuals . . . unprotected by the right to keep and bear arms." *Binderup*, 836 F.3d 343; *accord id.* at 357 (Hardiman, J., concurring) ("the most cogent principle that can be drawn from traditional limitations on the right to keep and bear arms is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment").

Judge Ambro's opinion in *Binderup* provides, for courts in this Circuit, the governing "framework for deciding as-applied challenges to gun regulations." 836 F.3d 346.[6] Under the framework, the Court first must examine "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id.* Where the case concerns "a presumptively lawful regulation," this analysis requires examining "the traditional justifications for excluding from Second Amendment protections the class" in which the plaintiff is included, determining whether the challenger has "present[ed] facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class of which he appears to be a member." *Id.* at 347. If the challenger establishes that the

[6] Because the Complaint does not use the words "facial challenge" or make any effort to show that § 922(g)(3) "is unconstitutional in all of its applications," (such as to controlled substances *other* than marijuana), Defendants construe Plaintiff's challenges to be as-applied in nature.

challenged law burdens his Second Amendment rights, "the burden shifts to the Government to demonstrate that the regulation satisfies some form of heightened scrutiny." *Id.*

A. The Class of Unlawful Drug Users to Whom Plaintiff Belongs is Excluded From the Second Amendment's Protections.

The class of unlawful drug users to which Plaintiff belongs is excluded from the Second Amendment's protections. History and tradition show that the Second Amendment protects "the right of *law-abiding, responsible* citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635 (emphasis added). Conversely, history and tradition also show that the Second Amendment permits the Government to disarm citizens who are not law-abiding and who cannot use firearms "responsibl[y]." *Id.* Most obviously, there is a tradition of prohibiting "the possession of firearms by felons." *Id.* Indeed, Judge Ambro's opinion in *Binderup* explains that this principle "dates back to our founding era." *Binderup*, 836 F.3d at 349 (Ambro, J.). There is also a long established tradition of prohibiting the possession of firearms by "the mentally ill." *Heller*, 554 U.S. at 626. So too, states have long prohibited intoxicated persons from carrying or discharging firearms. *See, e.g.*, *State v. Shelby*, 2 S.W. 468, 468–69 (Mo. 1886). [7]

The disarming of habitual abusers of unlawful drugs is analogous to the disarming of felons, people with mental illnesses, and intoxicated people. Like all of those categories of people, habitual drug abusers cannot be expected to be "responsible" in their use of firearms. More specifically, "habitual drug abusers" are "analogous to … felons," *U.S. v. Yancey*, 621 F.3d 681, 684 (7th Cir. 2010), since they are law-breaking rather than "law-abiding," *Heller*, 554 U.S.

[7] A majority of states restrict the carrying or discharge of a firearm while intoxicated. *See, e.g.*, Mass. Gen. Law 269 § 10H (2018) (prohibition on "carrying loaded firearm while under influence of liquor, marijuana, narcotic drugs, depressants or stimulant substances"); Ga. Code § 16-11-134 (unlawful "to discharge a firearm while . . . under the influence of alcohol or any drug to the extent it is unsafe"); Nev. Rev. Stat. 202.257 ("unlawful for a person who . . . [h]as a concentration of alcohol of 0.10 or more . . . to have in his or her actual physical possession any firearm" when outside his or her residence).

at 635. Habitual drug abusers are also comparable to the mentally ill. Indeed, a few years before Congress instituted the ban on possession of firearms by the mentally ill and habitual drug abusers in the GCA, the Supreme Court described drug addiction as an illness not unlike other mental illnesses. *See Robinson v. Calif.*, 370 U.S. 660, 667 (1962). These parallels were recognized by Congress in enacting the GCA. *See* 114 Cong. Rec. 21784 (1968) ("No one can dispute the need to prevent drug addicts, mental incompetents, persons with a history of mental disturbances, and persons convicted of certain offenses, from buying, owning, or possessing firearms"). And, of course, drug abusers are analogous to intoxicated people. Habitual drug abuse, no less than intoxication, impairs one's ability to keep and carry firearms responsibly.

Drawing on these parallels, courts have had no difficulty concluding that Congress did not violate the Second Amendment by prohibiting unlawful drug users from possessing firearms because such individuals fall outside the protected class. For example, in *U.S. v. Dugan*, the Ninth Circuit explained that unlawful and "[h]abitual drug users, like career criminals and the mentally ill, more likely will have difficulty exercising self-control, particularly when they are under the influence of controlled substances." 657 F.3d 998, 999 (9th Cir. 2011). In *Yancey*, the Seventh Circuit drew on the sources cited above and explained that, just as the mentally impaired are excluded from the Second Amendment's protections, "[e]xtending the ban to those who regularly abuse drugs makes particular sense because . . . [of] the similarity between the two groups." 621 F.3d at 685. Likewise, in *U.S. v. Seay*, 620 F.3d 919 (8th Cir. 2010), the Eighth Circuit concluded that "§ 922(g)(3) is the type of 'longstanding prohibition[] on the possession of firearms' that *Heller* declared presumptively lawful," and noted the similarities between the section and those restricting violent misdemeanants and felons from possessing firearms. *See* 620 F.3d at 924-25.

Indeed, the criminalization of the unlawful use of controlled substances such as marijuana closely parallels the enactment of other laws recognized by *Heller* as "longstanding prohibitions," such as those on who may possess firearms or on "dangerous and unusual weapons." *Heller*, 554 U.S. at 626-27. For example, the 1937 tax law Plaintiff cites, *see* Compl. ¶¶ 60-65, is similar in form and date to the initial regulation of machine guns, which "fall outside the protection of the Second Amendment." *U.S. v. One Palmetto State Armory . . . ,* 822 F.3d 136, 143 (3d Cir. 2016) (*citing, e.g., Heller*, 554 U.S. at 627-28); *see* National Firearms Act ("NFA"), 48 Stat. 1236, 26 U.S.C. chap. 53 (1934); *U.S. v. Newman*, 134 F.3d 373 (6th Cir. 1998) (unpublished) (the 1934 NFA "reveals an unmistakable intent to prohibit possession of any machine gun the manufacture or importation of which was not explicitly authorized by [ATF]"). Modern regulations need not precisely "mirror" their historical counterparts. *Binderup*, 836 F.3d 351 (Ambro, J.). Rather, in discerning the historical scope of the Second Amendment, courts should "reason by analogy from history and tradition," sustaining not just the historical restrictions themselves but also their "lineal descendants." *Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Because "those whose judgment is seen as compromised by mental illness, mental retardation, or drug or alcohol addiction have historically been seen as less than full rightholders," Volokh, 56 UCLA L. Rev. at 1510, they fall outside the class of those historically included in the right to keep and bear arms.

B. Plaintiff Has Failed to Distinguish Himself From the Class of Unlawful Drug Users Properly Banned From Possessing Firearms.

As explained above, there is no exception to the federal law prohibition on possession of marijuana for those using marijuana for state-approved medical purposes. Plaintiff has admitted that he is a "consumer" of marijuana and plans to continue to use marijuana in violation of

federal law.[8] Given this admission, there is nothing that can distinguish him from the historically-barred class and no doubt that he is an "individual[] . . . unprotected by the right to keep and bear arms." *Binderup*, 836 F.3d 343.

The Ninth Circuit's opinion in *Dugan* is instructive. *See* 657 F.3d 998. Although not evident from the face of the opinion, Dugan, like Plaintiff, possessed a state-issued card exempting him from state prosecution for using marijuana for medical purposes. *See* Br. for Appellant at 59, Dugan, 657 F.3d 998 (No. 08-10579), ECF No. 57 ("Here, Mr. Dugan was . . . licensed to grow and use medical marijuana."). Indeed, the central argument in Dugan's Second Amendment challenge was that "millions of Americans peacefully engage in the unlawful use of marijuana—and millions more do so legally under state medical marijuana laws—without engaging in any behavior that would provide a legitimate basis for excluding them from the reach of the Second Amendment." *Id*. at 57. The Ninth Circuit, however, treated Dugan's status as a medical marijuana cardholder as adding no weight to his Second Amendment claim—and rightly so. Congress has determined that marijuana "has no currently accepted medical use in treatment in the United States," 21 U.S.C. § 812(b)(1)(B), and has accordingly specified that it may not be validly prescribed or lawfully possessed, *id*. §§ 829, 844(a). As explained above, Pennsylvania's different view of marijuana's potential medical benefits makes no difference to this analysis.

Nor has Plaintiff identified any other facts that would distinguish him from other unlawful users of marijuana. To the contrary, the facts about Plaintiff underscore that he is

[8] The Complaint likewise acknowledges that Plaintiff informed staff at "the local gun store" that "he would answer 'yes' to Question 11(e)" [Are you an unlawful user of, or addicted to, marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?] on ATF Form 4473. Compl. ¶¶ 33, 38, 162. Plaintiff's allegations concerning ATF policy regarding the possession a medical cannabis card, *see* Compl ¶¶ 124-26, are of no consequence because he admitted his status as an unlawful user to the firearms retailer.

properly treated as a person outside the scope of Second Amendment protections. To begin, Plaintiff's allegations in the Complaint leave no room to doubt that he is fully aware of the scope and contours of the federal-law ban on the possession of marijuana. *Cf. Bryan v. U.S.*, 524 U.S. 184, 194 (1998) (in firearms context, weighing whether there was a "danger of ensnaring individuals engaged in" conduct they did not know "was unlawful"). As Plaintiff explains, he is a "strong proponent of legalizing medical cannabis," indicating his knowledge of the legal regime. Compl. ¶ 25. Further, he provides evidence of his knowledge and facilitation of the unlawful use of controlled substances by others, explaining that he has measured the successful outcomes yielded by the "switching to Medical Cannabis" by "his patients," even though their use of cannabis would be equally unlawful. Compl. at ¶ 27. Indeed, his interest in facilitating the violation of federal law regarding controlled substances extends to his having been "certified . . . to recommend medical cannabis to qualifying patients." Compl. at ¶ 22. These are not the behaviors of someone who is a "law-abiding, responsible citizen[]." *Heller*, 554 U.S. at 634-35.

Nor can Plaintiff rely on his assertion that he has "no propensity for violence" as a basis on which to distinguish himself from others who are outside the scope of Second Amendment protections. *See* Compl. at ¶ 30. First, Judge Ambro's lead opinion in *Binderup* did not accept the argument that a challenger's showing that "he poses no continuing threat to society,'" has relevance to a Second Amendment claim. 836 F.3d at 349 (quoting *Barton*, 633 F.3d at 174). In any event, the basis for the prohibition on Plaintiff's possession of firearms is not his propensity for violence, but his displayed unlawful conduct—namely, Plaintiff's acknowledgment that he is a current "consumer" of marijuana, Compl. at ¶ 22, and his unwillingness to "return[] his medical cannabis card." *Id.* at ¶ 39. Because that unlawful conduct is continuing, there is no basis for restoring his Second Amendment rights. And because Plaintiff falls outside the ambit

of Second Amendment protections, the Court needs go no further to dismiss his Second Amendment claims.

C. As Applied to Plaintiff, 18 U.S.C. § 922(g)(3) Satisfies Strict Scrutiny Or Any Lesser Form of Review.

Because Plaintiff's disqualification from firearms possession falls squarely within an exception to the Second Amendment right as originally understood, and as explicated in *Heller*, this Court need and should go no further to dismiss Plaintiff's claims. If, however, this Court were to hold that application of the challenged law implicates Second Amendment rights, then under Judge Ambro's lead opinion in *Binderup*, this Court must proceed by applying step two of the *Marzzarella* framework: "consider[ation] [of] whether" the applicable section of 18 U.S.C. § 922(g)—here, (g)(3)—"survives heightened scrutiny as applied." 836 F.3d at 353. Judge Ambro's opinion drew on *Marzzarella*, which, like *Binderup*, involved a challenge to 18 U.S.C. § 922(g)(1) to conclude that intermediate scrutiny applied, but here there is no need to decide between the two because application of § 922(g)(3) to Plaintiff satisfies strict scrutiny.[9]

Under strict scrutiny, a regulation must be "justified by a compelling government interest" and must be "narrowly drawn to serve that interest." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). Although this is an exceedingly demanding standard, the Supreme Court has stated that it is not the case that strict scrutiny is "strict in theory, but fatal in fact," because cases do arise in which it is satisfied. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). This is such a case.

The government's interest in "disarm[ing] 'unvirtuous citizens,'" *Yancey*, 621 F.3d at 684-85, and restricting firearms to "law-abiding, responsible citizens," *Heller*, 554 U.S. at 635,

[9] In addition, because strict scrutiny is satisfied for Plaintiff's as-applied challenge, intermediate scrutiny would also be satisfied.

has long been recognized. Even if that traditional understanding of the Second Amendment does not remove section 922(g)(3) from means-end scrutiny altogether, it at least supplies a compelling justification for the disarmament of habitual, unlawful drug abusers. "[T]he government has a strong interest in preventing people who already have disrespected the law . . . from possessing guns." *U.S. v. Meza-Rodriguez*, 798 F.3d 664, 673 (7th Cir. 2015). Congress enacted the GCA, including § 922(g)(3), to further this interest by addressing the problem of "the rise in lawlessness and violent crime in the United States." S. Rep. No. 89-1866, at 3; *see Huddleston v. U.S.*, 415 U.S. 814, 824 (1974) ("The principal purpose of the [1968] federal gun control legislation, therefore, was to curb crime by keeping firearms out of the hands of those not legally entitled to possess them") (internal quotation marks omitted). The prohibition of possession of a firearm in § 922(g)(3) is intended to further this compelling government interest.

As applied to Plaintiff, moreover, Section 922(g)(3) is narrowly tailored to this compelling government interest. By stating his commitment to "continu[ing] to use" an unlawful drug in violation of federal law, Plaintiff has openly proclaimed that he is not a "law-abiding, responsible citizen[]," *Heller*, 554 U.S. at 635, and declared that he is entitled to pick and choose his compliance with the law. Application of Section 922(g)(3) to Plaintiff is therefore narrowly-tailored to the compelling interest in restricting firearms to the law-abiding and responsible citizens through firearms laws. *Cf. Binderup*, 836 F.3d 356.

That 18 U.S.C. § 922(g)(3), as applied to Plaintiff, is narrowly tailored to this interest is confirmed by the "limited temporal reach" of its application. *U.S. v. Carter*, 669 F.3d 411, 419 (4th Cir. 2012). Whereas courts have questioned the lifetime application of the bans on firearms possession by convicted criminals and those determined at one point in time to be mentally infirm, *see, e.g.*, *Binderup*, 836 F.3d 364-65, 380 (Hardiman, J., concurring) (discussing whether

"the government may permanently disarm" an individual and rejecting a "[f]orever prohibiti[on]"); *Tyler v. Hillsdale Cty.*, 837 F.3d 678, 695 (6th Cir. 2016) (criticizing "§ 922(g)(4)'s inflexible, lifetime ban"), Section 922(g)(3) imposes no such enduring restriction. To the contrary, "an unlawful drug user may regain his right to possess a firearm simply by ending his drug abuse" *Dugan*, 657 F.3d at 999, *i.e.*, by choosing to rejoin the community of law-abiding individuals who are not using illegal substances that impair their judgment. Thus, "[b]y initially disarming unlawful drug users and addicts while subsequently restoring their rights when they cease abusing drugs, Congress tailored the prohibition to cover only the time period during which it deemed such persons to be dangerous." *Carter*, 669 F.3d at 419.

For these reasons, application of 18 U.S.C. § 922(g)(3) to Plaintiff satisfies strict scrutiny, as well as any other form of heightened scrutiny.

III. Plaintiff's Right to Equal Protection Has Not Been Violated.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Although this clause expressly applies only to the States, the Supreme Court has found that its protections are encompassed by the Due Process Clause of the Fifth Amendment and therefore apply to the federal government. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Plaintiff challenges § 922(g)(3) under the equal protection component of the Due Process Clause, Compl. ¶¶ 52–57, but this claim is also without merit.

The equal protection component of the Due Process Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). As a result, to establish an equal protection violation, Plaintiff must demonstrate that "the Government has treated [him] differently from a similarly situated

party and that the Government's explanation for the differing treatment does not satisfy the relevant level of scrutiny." *Real Alternatives, Inc. v. HHS*, 867 F.3d 338, 348 (3d Cir. 2017). "Persons are similarly situated under the Equal Protection Clause when they are alike in all relevant aspects." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 273 (3d Cir. 2014). Plaintiff's equal protection claims are premised on the theory that the United States is treating him differently from others "with the same medical conditions," Compl. ¶ 132; those who "consume[] alcohol," Compl. ¶ 139; and those who "partake in . . . federally unregulated substances . . . such as kratom, salvia divinorum, [etc]." Compl. ¶ 140.

However, Plaintiff's characterization to the contrary, as an avowed "consumer" of marijuana, a federally-prohibited substance, he is *not* similarly situated to law-abiding citizens who consume "alcohol," "unregulated substances," or who receive lawful medical treatments. Because all users of marijuana are violating federal law, they are not similarly situated to those citizens who are not violating federal law. *See Marin All. for Med. Marijuana v. Holder*, 866 F.Supp. 2d 1142, 1158 (N.D. Cal. 2011) (finding that those whose drug use violates the Controlled Substances Act are not similarly situated to those whose use is permitted by that law). As a result, Plaintiff's Complaint does not allege that he has been "treated . . . differently from a similarly situated party," *Real Alternatives*, 867 F.3d at 348, and it therefore fails to state an equal protection claim.

IV. Plaintiff's Right to Due Process Has Not Been Violated.

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." There are two elements to a procedural due process violation. First, there must be a protected liberty or property interest at stake, *see Robb v. City of Phila.*, 733 F.2d 286, 292 (3d Cir. 1984), because "*no* process is due if one is not deprived of

life, liberty, or property." *Kerry v. Din*, 135 S. Ct. 2128, 2132 (2015) (emphasis in original). Second, if protected interests are implicated, then the court must address what procedures constitute due process of law. *See Rogin v. Bensalem Tp.*, 616 F.2d 680, 694 (3d Cir. 1980).

Plaintiff's procedural due process claim is simply a repackaging of his Second Amendment challenge to the ban on his possession of a firearm while an unlawful user of marijuana. As an initial matter, Plaintiff does not have a constitutionally protected liberty interest in simultaneously breaking the law as a marijuana "consumer" and purchasing a firearm, and his due process claim thereby fails to establish the first element. *Robb*, 733 F.2d 292; *see also Wilson*, 835 F.3d 1098 (Plaintiff "does not have a constitutionally protected liberty interest in simultaneously holding a registry card and purchasing a firearm"). Further, "[t]he plain language of [§ 922(g)(3)] makes clear Congress' decision to bar all" unlawful drug users from possessing firearms. *Bell v. U.S.*, 2013 WL 5763219 (E.D. Pa. Oct. 24, 2013) (internal quotations omitted) (rejecting procedural due process challenge seeking an individualized hearing on application of Section 922(g)(1), the ban on firearms possession by convicted felons).[10] "As a result, due process does not entitle [Plaintiff] to a hearing . . . because the results of such a hearing would have no bearing on whether he is subject to the disability imposed by" the statute. *Id.*; *see also Jefferies v. Sessions*, 278 F. Supp. 3d 831, 836 (E.D. Pa. 2017) (no procedural due process right to a hearing to determine application of Section 922(g)(4)); *Richmond Boro Gun Club v. City of N.Y.*, 97 F.3d 681, 688-89 (2d Cir. 1996) ("When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process—the legislative process. The challenges to such laws must be based on

[10] In an unpublished summary affirmance, the Third Circuit confirmed that "for the reasons stated by the District Court, [the] procedural due process claim . . . [was] without merit." *Bell v. United States*, 574 F. App'x 59 (Mem.) (3d Cir. 2014), *cert denied*, 135 S. Ct. 693 (Nov. 17, 2014).

their substantive compatibility with constitutional guarantees").

Even if Plaintiff had identified a protected interest, however, his as-applied due process claim necessarily fails because additional process is unnecessary where there is no risk of error under existing processes. Under the governing legal test set forth by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), if a protected interest is identified, the merits of a due process claim turn on: (1) "the risk of an erroneous deprivation of [a recognized] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (2) "the Government's interest" affected by the process, including "the fiscal and administrative burdens" of alternative process. *Id.* at 335. Where, as here, the risk of erroneous deprivation through existing procedures in "the ordinary case" is "insubstantial," this limits the need for additional or substitute procedures. *Mackey v. Montrym*, 443 U.S. 1, 14 (1979). Plaintiff has been asked directly whether he is an unlawful user of a controlled substance, which creates no risk of error: Plaintiff not only does not dispute that he holds a medical marijuana card, he does not dispute that he is an actual user of marijuana. And, as outlined above, every person who uses marijuana is not "law abiding." *See supra* Part I. So although Plaintiff alleges that he should have been "provide[d] . . . with [some] form of hearing," Compl. ¶ 149, no amount of further process would yield a different outcome, and Plaintiff's procedural due process claim necessarily fails. *Schweiker v. McClure*, 456 U.S. 188, 200 (1982).

V. Plaintiff's Substantive Due Process Rights Have Not Been Violated.

Plaintiff's Complaint sets forth a pair of substantive due process theories, both of which lack merit. First, Plaintiff asserts that he has a substantive due process "right to possess a firearm under the Second Amendment." Compl. ¶ 157. However, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of

government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273 (1994). Consequently, courts have rejected claims of a constitutional right to self-defense under the Substantive Due Process Clause of the Fifth Amendment because such a right is cognizable only under the Second Amendment. *See, e.g.*, *Nordyke v. King*, 644 F.3d 776, 794 (9th Cir. 2011) (rejecting equal protection claim because "although the right to keep and to bear arms for self-defense is a fundamental right, that right is more appropriately analyzed under the Second Amendment" (citation omitted)), vacated on other grounds by 681 F.3d 1041 (9th Cir. 2012) (en banc); *U.S. v. Portillo-Munoz*, 643 F.3d 437, 442 (5th Cir. 2011), as revised (June 29, 2011) ("Since the Second Amendment explicitly provides for a constitutional right to bear arms, Portillo cannot look to the due process clause as an additional source of protection for a right to keep and bear arms."); *U.S. v. Carey*, 602 F.3d 738, 741 n.2 (6th Cir. 2010) (rejecting claims that attempt to "conflate the enumerated Second Amendment right with Equal Protection and Due Process protections under the Fifth Amendment."); *Gardner v. Vespia*, 252 F.3d 500, 503 (1st Cir. 2001) (holding that substantive due process was inapplicable where thrust of plaintiff's claim "is the infringement upon his right to bear arms," as "Second Amendment jurisprudence provides an adequate answer to this challenge"). Under this principle, Plaintiff's substantive due process claim rises and falls with his Second Amendment claim, and must be dismissed for the same reasons as that claim. *See supra* Part II.

Second, Plaintiff incorrectly argues that his Fifth Amendment right against self-incrimination was violated when he was required to complete ATF Form 4473 to obtain a firearm from a federally licensed firearm dealer. Compl. ¶¶ 160-66. Specifically, Plaintiff focuses on Question 11(e) of the form, which asked whether he was "an unlawful user of [among

other things] . . . marijuana." *Id.* at ¶ 162. Despite his affirmative answer that he uses marijuana, *id.* at ¶ 165, Plaintiff does not allege that he has been criminally prosecuted because of this disclosure. As a plurality of the Supreme Court explained in *Chavez v. Martinez*, "a violation of the constitutional right against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case." 538 U.S. 760, 770 (2003); *see also Renda v. King*, 347 F.3d 550, 559 (3d Cir. 2003) (applying *Chavez* and holding, "it is the use of coerced statements during a criminal trial, and not in obtaining an indictment, that violates the [Self-Incrimination Clause of] the Constitution."). As in *Chavez*, "[h]ere, [Plaintiff] was never made to be a 'witness' against himself in violation of the Fifth Amendment Self-Incrimination Clause because his statements were never admitted as testimony against him in a criminal case." *Id.* at 767.[11] Thus, like Plaintiff's other substantive due process claim, Plaintiff's self-incrimination clause claim can provide no basis for relief.

VI. Plaintiff is Not Entitled To Relief Under 18 U.S.C. § 925(c) or 18 U.S.C. § 1925(c).

The fifth cause of action in Plaintiff's complaint requests "Relief from Prohibition under 18 U.S.C. § 1925(c)." That statutory provision does not exist. To the extent Plaintiff meant to assert a claim under 18 U.S.C. § 925(c), under controlling Supreme Court precedent from *U.S. v. Bean*, 537 U.S. 71 (2002), there is no jurisdiction over such a claim. "Section 925(c) gives

[11] Additionally, as ATF Form 4473 discloses, its general purpose is not to solicit information for criminal prosecutions; rather, the form is designed so that a federally licensed firearms dealer "may determine if he/she may lawfully sell or deliver a firearm to the person identified in Section A, and to alert the transferee/buyer of certain restriction on the receipt and possession of firearms." *See* Exhibit __, ATF Form 4473. Indeed, dealers do not automatically remit forms to ATF; instead, dealers must retain completed forms. *See* 27 C.F.R. § 478.121; *see also U.S. v. Scherer*, 523 F.2d. 371, 375-76 (7th Cir. 1975) (rejecting self-incrimination challenge to the Gun Control Act and Form 4473 because they "regulate an essentially non-criminal activity the disposition of firearms and fall within the 'required records' standards established by *Shapiro* [*v. U.S.*, 335 U.S. 1 (1948)) and further enunciated in *Grosso* [*v. U.S.*, 390 U.S. 62, 68 (1968)].").

district courts jurisdiction to review applications *only after* a 'denial by ATF.'" *Pontarelli v. Dep't of Treasury*, 285 F.3d 216, 231 (3d Cir. 2002).[12] Plaintiff alleges no denial by ATF here, and jurisdiction is therefore lacking.

Section 925(c) allows a "person who is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition" to apply "for restoration of their firearms privileges." *Pontarelli*, 285 F.3d at 217. "Since 1992, however, the appropriations bar has prevented ATF, to which the Secretary has delegated authority to act on § 925(c) applications, from using 'funds appropriated herein . . . to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. [§]925(c).'" *Bean*, 537 U.S. at 74-5. (quoting Pub. L. No. 102-393, 106 Stat. 1729, 1732 (1992), and subsequent legislative enactments); *see* Pub. L. No. 116-6, 133 Stat. 13 (Feb. 15, 2019) (same language). In *Bean*, the plaintiff argued that because of the "appropriations bar," "ATF's failure to act constitutes a 'denial' within the meaning of § 925(c), and that, therefore, district courts have jurisdiction to review such inaction." 537 U.S. at 75. Writing for a unanimous Court, Justice Thomas found:

> Inaction by the ATF does not amount to a "denial" within the meaning of § 925(c). The text of § 925(c) and the procedure it lays out for seeking relief make clear that an actual decision by ATF on an application is a prerequisite for judicial review, and that mere inaction by ATF does not invest a district court with independent jurisdiction to act on an application.

Id. at 75-6. The Court then held, "the absence of an actual denial of respondent's petition by ATF precludes judicial review under § 925(c) . . . ." *Id.* at 78; *see also Pontarelli*, 285 F.3d at 218 (holding "because the appropriations ban suspends ATF's ability to issue the 'denial' that

[12] When *Bean* and *Pontarelli* were decided, ATF was contained within the Department of the Treasury, and ATF's delegated authority came from the Secretary of Treasury. Shortly thereafter, the Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002), transferred the functions of ATF from the Department of the Treasury to the Department of Justice, under the general authority of the Attorney General.

[is] a prerequisite, it effectively suspends that statute's jurisdictional grant."). In light of the absence of jurisdiction, any claim under 18 U.S.C. § 925(c) must be dismissed.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be granted.

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Respectfully submitted,

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